Jasco Industries, Inc. *and* Local 348-S, United Food and Commercial Workers International Union, AFL–CIO. Case 29–CA–21774

April 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On January 21, 1999, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent filed a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.[1]

1. The Respondent argues in its exceptions that the extended certification year[2] began in January 1997 when it expressed a willingness to bargain and that its letter of February 11, 1998,[3] was therefore sent after the expiration of the certification year. We find, contrary to the Respondent's argument, that the extended certification year began on March 18, 1997, when face-to-face negotiations began.[4] *Van Dorn Plastic Machinery Co*., 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991) (absent unwarranted delay by the union, certification year after an employer's initial refusal to bargain commences on date of first bargaining session;[5] *Dominguez Valley Hospital*, 287 NLRB 149, 151 (1987), enfd. sub nom. *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905 (9th Cir. 1990). During the extended certification year commencing on March 18, 1997, the Union enjoyed an irrebuttable presumption of majority status, and the Respondent was not entitled to question the Union's status. *Brooks v. NLRB*, 348 U.S. 96 (1954); *Mar-Jac Poultry*, supra. Thus, neither the filing of the rival petition by Local 400, Production Workers Union in January 1998 nor the submission of the petition by the employees to the Respondent in November 1997,[6] justified the Respondent's refusal to bargain during the extended certification year. Accordingly, we find that the Respondent's refusal to bargain with the Union after February 11, 1998,[7] violated Section 8(a)(5) and (1) of the Act.

2. We disagree with the judge that the Respondent's refusal to bargain warrants extending the certification year for an additional full 1-year period. Under the circumstances presented here, we find it unnecessary to order a complete renewal of the certification year. The Respondent bargained with the Union in apparent good faith from March 18, 1997, until August 12, 1997, a period of about 5 months. No bargaining occurred between August 12, 1997, and the Respondent's refusal to bargain on February 11, 1998. While this hiatus in bargaining cannot be said to be the "fault" of either party, we find that the interruption of bargaining and the Respondent's subsequent refusal to bargain had a disruptive effect on the bargaining process. Under all the circumstances, we conclude that a 6-month extension of the certification year is appropriate.[8] This period will "provide the parties with a reasonable interval in which to resume negotiations and, possibly, reach an agreement, without unduly saddling employees with a bargaining representative they may no longer support." *Dominguez Valley Hospital*, supra, 287 NLRB at 151; *Colfor*, *Inc*., 282 NLRB at 1174–1175. In fashioning this remedy we stress that the Respondent's duty to bargain will not automatically end

[1] We shall modify the judge's recommended Order to correct an inadvertent error and to conform to our decision in *Excel Container*, 325 NLRB 17 (1997).

[2] Following the Respondent's initial refusal to bargain with the Union, the Board, on November 29, 1996, ordered the Respondent to bargain on request with the Union. 322 NLRB No. 100 (not reported in Board volumes). The Board stated that the initial period of the certification would be construed as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962).

[3] In that letter the Respondent's attorney stated that in light of a petition for recognition filed by Local 400, Production Workers Union, the Respondent had "legitimate concerns" about the Union's status. Further, the letter stated that if Local 400's petition remains viable, the Respondent must be counseled "to forbear in taking any action until the National Labor Relations Board determines which union, if any, represents JASCO's unit employees."

[4] Although the Respondent contends in its brief in support of exceptions that it "initiated bargaining in January of 1997" and that negotiations were "clearly underway by January of 1997," it admitted in par. 7 of its answer that "on or about March 19, 1997 the Union and the Respondent initiated negotiations." The record shows that there was some written correspondence between the parties in January 1997, but the first bargaining session occurred on March 18, 1997. There is no indication in the record of any bargaining sessions occurring prior to that date.

[5] In *Van Dorn*, the Board overruled *Colfor, Inc*., 282 NLRB 1173, 1174 (1987), enfd. 838 F.2d 164 (6th Cir. 1988), to the extent it held that the certification year commences when the employer furnishes requested information and expresses its willingness to bargain.

[6] A petition signed by 32 of 71 unit employees was submitted to the Respondent on November 5, 1997. That petition requested the Respondent to stop bargaining with the Union because the employees were requesting a new election.

[7] Although the judge found, in agreement with the General Counsel, that the Respondent refused to bargain with the Respondent "[b]eginning on or about November 17, 1997," we are not satisfied that the facts support a clear refusal to bargain in November 1997. Rather, we find that the Respondent did not clearly refuse to bargain with the Union until its letter of February 11, 1998, a date within the 1-year extended certification year. Accordingly, we shall modify the judge's conclusions of law to date the violation as of February 11, 1998.

[8] An extension remedy need not be the product of a simple arithmetic calculation. *Colfor, Inc*., supra, 282 NLRB at 1174.

after the 6-month period when the certification year expires. At that point, the Union will enjoy a rebuttable presumption that its majority status continues. *Colfor, Inc.*, supra at 1175.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 4 of the judge's conclusions of law.

"4. By refusing to bargain with the Union since February 11, 1998, the Respondent has violated Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jasco Industries, Inc., Central Islip, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in Central Islip, New York copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 1998."

Henry J. Powell, Esq., for the General Counsel.
Robert J. Dinnerstein, Esq., for the Respondent.
J. Warren Mangan, Esq. (O'Connor & Mangan), for the Union.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on August 26, 1998, in Brooklyn, New York.

A charge was filed on February 20, 1998, by the Union against the Respondent, as set forth above in the case caption, alleging a violation of Section 8(a)(1) and (5) of the Act. On April 22, 1998, a complaint issued alleging that the the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to engage in collective-bargaining negotiations with the Union.

On the entire record of this case, including briefs filed by counsel for the General Counsel, and counsel for the the Respondent, I make the following findings of fact and conclusions of law.

The Respondent is a New York corporation with its principal office and place of business located in Central Islip, New York, where it is engaged in the manufacture and nonretail sale of wood toy store displays. The Respondent, annually, in the course of its regular business purchases and receives at its central Islip facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New York. It is admitted, and I find that the the Respondent is an employer, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The facts of this case are not in dispute. On April, 9, 1996, the Union was certified by the Board as the collective-bargaining representative of the Respondent's production and maintenance employees. Thereafter, the Respondent refused to bargain with the Union, and the Union filed an unfair labor practice charge. A complaint issued. The case was tried and on November 29, 1996, pursuant to a Motion for Summary Judgment, the Board issued a Decision and Order, *Jasco, Industries,* 322 NLRB No. 100 (1996) (not reported in Board volumes), which found that the Respondent had refused to bargain, as alleged in the complaint, and ordered that the initial period of certification shall commence on the date that the the Respondent begins to bargain in good faith, citing *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

On or about March 18, 1997, the Union and the Respondent commenced collective-bargaining negotiations. Such negotiations took place through August 12, 1997. Thereafter, counsel for the Union sent letters on November 17 and December 9, 1997, January 2 and on February 2, 5, and 13, 1998, requesting that the Respondent continue collective-bargaining negotiations.

The Respondent refused to bargain with the Union based on a November 1997 employees' petition, allegedly signed by 32 of the Respondent's employees stating that they did not want the Respondent to bargain with the Union, and that they wanted a new election. At the time the petition was received, the Respondent had a compliment of 70 employees. The Respondent has a yearly peak compliment of about 110 employees. The Respondent took no steps to ascertain whether the signatures were genuine, or to ascertain whether the petition reflected the wishes of those alleged employees.

On February 11, 1998, the Respondent refused to bargain with the Union contending additionally that a petition for election filed by Local 400, Production Workers Union (Local 400), seeking to represent the Respondent's production and maintenance employees raised a question concerning representation. Thereafter, the Region dismissed Local 400's petition, and on June 16, 1998, the Board denied Local 400's request for review.

To date the Respondent also refuses to bargain with the Union. The Respondent's attorney contends that the Respondent has a good-faith doubt that the Union continues to represent the Respondent's employees based on the employees' petition and Local 400's petition for election. The Respondent further refuses to bargain with the Union based on it's attorneys advice

that the Board's well-established *Mar-Jac Poultry* remedy should be reviewed.

Analysis and Conclusions

The undisputed facts conclusively establish that following the Union's initial certification on April 9, 1996, the Respondent refused to bargain with the Union on or about May 30, 1960. The Union then filed an unfair labor practice charge which ultimately concluded with the Board's decision, *Jasco Industries*, supra. That decision provided for the *Mar-Jac Poultry* remedy, as set forth and described above. Beginning on or about November 17, 1997, the Respondent again refused to bargain with the Union contending initially that a petition allegedly submitted to the Respondent president, Jay Austrain, by his employees stating that the employees wanted a new election, provided proof that there was a question concerning representation. The Respondent thereafter further contended that the representation petition filed by Local 400 firmly established that there was a question concerning representation, although such petition was dismissed by the Regional Director of Region 29, such dismissal upheld by the Board.

The Respondent, at trial, and in his brief contends *Mar-Jac Poultry* should be reviewed, and that the Board should find that the employee petition and the representation petition, described above, raise questions of representation.

Mar-Jac Poultry is still the law; *Jasco Industries,* supra. I expect it will continue to be the law, notwithstanding the Respondent's frivolous contentions set forth in the Respondent's counsel's brief. Moreover, the Board has continually held that "the mere filing of a representation petition by an outside, challenging union will no longer require, or permit an employer to withdraw from bargaining or executing a contract with an incumbent union." *RCA del Caribe, Inc.,* 262 NLRB 963 (1982); *Celebrity, Inc*., 284 NLRB 688, 690 (1987). Therefore, even without a certification, or a *Mar-Jac* extension, the Respondent would have had to continue bargaining, and execute a contract if terms were agreed upon, notwithstanding an employee petition and/or a representative petition being presented or filed with the Board during the course of bargaining.

Accordingly, I conclude that by refusing to engage in collective-bargaining negotiations when requested by the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. The Respondent is an employer, engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section (5) of the Act.
3. The Union is the collective-bargaining representative of the Respondent's part-time and full-time employees.
4. By refusing to bargain with the Union since November 17, 1997, the Respondent has violated Section 8(a)(1) and (5) of the Act.

Remedy

It is recommended that the Respondent be ordered to cease and desist from its refusal to bargain with the Union. It is also recommended that the Respondent be ordered to bargain with the Union upon request by the Union and if an agreement is reached as to the terms of a contract, to embody such agreement into a collective-bargaining agreement.

In addition, I recommend that the certification year begin on the date that the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry, Co*., supra.

ORDER

The Respondent, JASCO Industries, Inc., Central Islip, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 348-S, United Food and Commercial Workers International Union, AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfacing with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

> All full-time and regular part-time production and maintenance employees employed by the Employer to its 42 Windsor Place, Central Islip, New York location, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Central Islip, New York copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 30, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain with Local 348-S, United Food and Commercial Workers International Union, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees employed by us at our 42 Windsor Place, Central Islip, New York location, excluding all other employees, appice clerical employees, guards, and supervisors as defined in the Act.

JASCO INDUSTRIES, INC.